IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.406 of 1990
and
C.M.P.No.4762 of 1990

Linga Gounder (D1) .. Appellant
vs.

1.Gnanambal(Plaintiff-1)
2.Rathinaveni(Plaintiff-2)
3.Amirthavalli(D2) .. Respondents

Prayer: This Appeal has been filed under Section 96 of the Code of Civil Procedure against the decree and Judgment dated 18.01.1990, passed in O.S.No.704/1987 on the file of the Subordinate Court, Coimbatore.

For Appellant : Mr. S.Parthasarathy, Senior Counsel for Mr.K.Subramanyam

For Respondents 1 and 2 : Mr. S.Subbiah

Respondent 3 : Notice dispensed with.

JUDGMENT

This Appeal has been preferred against the Decree and Judgment in O.S.No.704/1987 on the file of the Subordinate Court, Coimbatore.

2. The short facts of the plaintiffs' case are as follows:-

2(i) The plaintiffs and the second Defendant are daughters of one Kumarasamy Gounder. The first Defendant is the son of the above said Kumarasamy Gounder. Kumarasamy Gounder's father was Avinashilingae Gounder. Due to joint efforts of the plaintiffs, Defendants and their father Kumarasamy Gounder, some properties were acquired. All the properties belonging to the joint family of the plaintiffs, Defendants and their father, are scheduled to the plaint.

2(ii) Kumarasamy Gounder, the father of the plaintiffs and the Defendants was suffering from several diseases from 1980 onwards. He was not mentally alright to execute a Will or any other documents. Kumarasamy Gounder died some eight months prior to filing of the Suit. During May-1987 the plaintiffs came to understand that the first Defendant had fabricated a document purported to be a Will alleged to have been

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executed by the deceased Kumarasamy Gounder. The plaintiffs applied for a registration copy of the Will and they obtained the same. The registration copy of the Will is produced alongwith the plaint.

2(iii) On seeing the recitals in the Will the plaintiffs were shocked. The Will was supposed to have been executed on 01.12.1981. All the properties have been settled in favour of the first Defendant. From 1980 onwards Kumarasamy was insane and he was suffering from mental disorder and he was not in a fit condition to execute a Will. Therefore it is quite clear that the first Defendant had got up and fabricated a bogus Will. The Will is not real but it is invalid and untenable. Even if the Will is registered it cannot be valid. Hence the plaintiffs have filed the suit for declaration that the Will is invalid and for consequential injunction. There are properties which were not covered under the Will. 2(iv) The first Defendant is not prepared to come for any kind of settlement for partition or division of properties. The Panchayat failed. Therefore the plaintiffs sent a registered notice dated 04.06.1987 through their advocate to the Defendant. The Defendant 1 and 2 received the notices but they failed to come for any settlement. As negotiations failed the plaintiffs have no other go except to file this suit for partition and separate possession of their share in the suit properties.

3. The first Defendant in his written statement has contended as follows:-

3(i) All the properties of the joint family were self acquired properties of Kumarasamy Gounder. The plaintiffs were never in joint possession of the suit property as co-owners. Kumarasamy Gounder was never ailing from any mental disease. Kumarasamy Gounder was hale and healthy and was looking after the entire properties and had purchased a tractor about four months prior to the date of his death. Till his death Kumarasamy Gounder was very active and was looking after the entire properties.

3(ii) Kumarasamy Gounder executed a registered a Will regarding his properties in favour of the first Defendant who is the only son under the registered Will dated 01.12.1981. Kumarasamy Gounder was mentally alert even at the time of execution of the said Will. Kumarasamy Gounder was admitted in the hospital for stomach ache and he was treated by Dr.Munirathinam Shetty for the above said complaint in the hospital. He was discharged after a month's treatment. At no point of time he was suffering from any mental disorder. During 1981 and 1982 he had no complaint of any kind regarding his health. After being discharged from the hospital in the year 1984 he was leading a normal life and he died of heart attack while he was traveling in a bus from his village to Coimbatore.

3(iii) Even in the Will Executed by Kumaraswami Gounder it has been clearly stated that all the properties belonging to the said Kumarasamy Gounder should go only to his son, the first Defendant, after his life time. The properties that are not mentioned in the Will are the properties referred to in Items 1 & 2 in Schedule II, while so, the Will

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was executed on 01.12.1981 and the tractor was purchased only in the year 1986. The deposits in the Indian Overseas Bank was made only after the execution of the Will. A mere reading of the Will executed by Kumarasamy Gounder will clearly show that all the properties belonging to him on the date of his death, should go only to the 1st Defendant.

3(iv) In view of the above said will this Defendant is the only person who is entitled to the suit properties and not the plaintiffs or the 2nd Defendant. The properties mentioned in Item 1 to Schedule II is the tractor, which was taken delivery by Kumarasamy Gounder few days before his death. At the time of death of Kumarasamy Gounder a sum of Rs.1,18,000/- was due to Canara Bank, RS Puram, Coimbatore, since the tractor was purchased on credit basis. The amount due to Canara Bank has been paid only by this Defendant after the death of Kumarasamy Gounder. Still some amount is due to Canara Bank. A sum of Rs.18,000/- is now in Indian Overseas Bank is not correct. Only a sum of Rs.8,000/- is available in the said bank. No amount mentioned in Item 3 to Schedule II is available. No one is liable to pay any amount to Kumarasamy Gounder at the time of this death.

3(v) As per the will executed by Kumarasamy Gounder, this Defendant alone is entitled to the properties mentioned in schedule I and items 1 & 2 to Schedule II. After the death of Kumarasamy Gounder this Defendant is entitled to the properties. As the Will was executed by the late Kumarasamy Gounder in a sound disposing state of mind and of his own accord, no question of declaring the Will as invalid arises. Hence the suit is liable to be dismissed with costs. The second Defendant remain expart.

4. On the above pleadings the trial Court has framed three issues and one additional issue and on the basis of the evidence, both oral and documentary, has come to the conclusion that the Will dated 1.12.1981 executed in favour of the first Defendant is not valid and consequently decreed the suit for plaintiffs' 2/3 share. Aggreived by the findings of the learned trail Judge, the first Defendant has preferred this Appeal.

5. Now the point for determination in this Appeal is whether the Will dated 01.12.1981 is valid and the Decree and Judgment passed in O.S.No.704/1987 is liable to be set aside for the reasons stated in the memorandum of Appeal?

6. The point:-

6(i) The only point to be decided in this Appeal is whether the findings of the trial Court in respect of Ex.B.1-Will dated 01.12.1981 is invalid, is sustainable? As per section 68 of the Evidence Act, the document which is required under law to be attested, is to be proved at least by examining one of the attestors to the document. In Ex.B.1-Will there are three attestors viz. i) K.M.Krishnasamy, ii)Muthusamy and iii) Nanjan. One of the attestors viz. Muthusamy has been examined as D.W.2 on the side of the Defendant to prove the Will. The learned trial Judge has discarded the evidence of D.W.2 on the ground that in the cross-

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examination he has deposed to the fact that he does not know as to the testator Kumarasamy affixing his thumb impression in the Will. He would say that he is aware about the affixing of thumb impression by the testator only in the presence of the Sub-Registrar. So it is clear from the evidence of D.W.2 that he was not present at the time when the testator executed the Will-Ex.B.1.

6(ii) The Sub-Registrar, who had registered Ex.B.1-Will was examined as D.W.4. D.W.4, the Sub-Registrar, in his evidence would depose that he has registered the Will on 1.12.1981 at Government Hospital, Coimbatore, and he has recorded the statement of the testator. But the said statement was not filed before the trial Court by D.W.4. He would further admit that there is not endorsement in Ex.B.1-Will to show that it was read over to the testator before registration.

6(iii) D.W.3 is the scribe of Ex.B.1-Will. He would depose that on 1.12.1981 between 12.00 noon and 1.00 p.m. he obtained the signature of the testator Kumarasamy Gounder in Ex.B.1-Will. He would say that Kumarasamy Gounder affixed his thumb impression in the Will. But in the cross-examination he would admit that he is not prepared any draft for the Will and in the chief-examination he would depose that on 1.12.1981 at 5.00 p.m. the Will was registered by the Registrar. But a perusal of Ex.B.1 will go to show that the Will was registered on 03.12.1981. The other attesting witness was not examined in this case. When one of the attestors viz. D.W.2 has deposed in the cross-examination that he has not seen the testator affixing his thumb impression in the Will. It is the bounden duty of the first Defendant, who relied on Ex.B.1 to prove the execution of the Will by examining the other attestor, who had seen the testator affixing his thumb impression on the Will. Further it is pertinent to note that the thumb impression found in the Will in the first and second pages and also the thumb impression of the testator found on the back of the first page, at the time of the registration, would indicate that the thumb impression found in pages 1 and 2 and the thumb impression on the back of page 1 at the time of Registration are different, in size and other external characters.

6(iv) There is absolutely no medical evidence to show that at the time of affixing the thumb impression in Ex.B.1-Will the testator Kumarasamy Gounder was not in a position to put his signature in the Will. On the other hand, D.W.1 himself would admit in the cross-examination that the testator Kumarasamy Gounder use to sign. Ex.B.1-Will was executed on 1.12.1981. As per the evidence of D.W.2, the testator Kumarasamy Gounder died five years after the execution of Ex.B.1-Will. So it is highly doubtful under what circumstance the testator Kumarasamy Gounder had affixed his thumb impression in ex.B.1-Will while he knows to put his signature in documents. Admittedly Kumarasamy Gounder had signed in Ex.B.1-Will while he was taking treatment in the hospital. There is no endorsement in Ex.B.1 by any doctor to the effect that the testator was in a sound disposing state of mind at the time of executing Ex.B.1-Will. I

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do not find any reason to discredit the reasoning given in the Judgment of the trial Court for rejecting Ex.B.1-Will. Under such circumstances, I am of the considered view that the findings of the learned trial Judge in coming to the conclusion that Ex.B.1-Will is not a genuine document, warrants any interference from this Court. Point is answered accordingly.

7. In fine, the Appeal is dismissed with costs, confirming the Decree and Judgment in O.S.No.704/1987 on the file of the Additional Sub-Court, Coimbatore. CMP.No.4762/1990 is also dismissed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To,
1. The Additional Subordinate Judge,
Coimbatore.

2. The Section Officer, VR Section,
High Court, Madras.

+ 1 CC To Mr. S.Thankasivan, Advocate SR NO.50072

+ 1 CC To Mr. S.Subbiah, Advocate SR NO.50019

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